

ARTICLE

Special Issue: Bias in International Law

Regulators' Mindsets, Ingroup Favoritism, and the National Treatment Obligation in World Trade Organization Law

Moshe Hirsch¹

¹Hebrew University of Jerusalem, Jerusalem, Israel

Corresponding author: moshe.hirsch@mail.huji.ac.il

(Received 10 March 2022; accepted 11 March 2022)

Abstract

Decision-making processes leading to governmental measures affecting international trade involve socio-cognitive processes, biases, and sociocultural factors. The legal prohibition of discrimination against imported products constitutes a fundamental principle of World Trade Organization (WTO) law, but discrimination against foreign products is widespread. This study explores the contribution of social cognitive and sociological literatures to international trade scholarship concerning the “national treatment” obligation. Ingroup favoritism bias, related cognitive biases, such as confirmation bias, and sociocultural processes, such as “loyalty norms”, facilitate and support discrimination against foreign products.

One of the most contested issues regarding the interpretation of GATT Article III concerns the role of regulators' intention in establishing a violation of this provision. The approach undertaken by the WTO Appellate Body is characterized by a preference for the “objective” test of regulators' intention (focusing on intention revealed in the regulatory measure itself), and a reluctance to take into account regulators' “subjective” intentions, discerned from regulators' statements and a variety of other sources. In contrast to the WTO Appellate Body's approach, this contribution suggests that once presented with credible evidence regarding key-role regulators' intentions, manifested in both the regulatory measure itself and in a variety of other items of evidence, it is desirable that WTO tribunals assign adequate probative weight to such intentions. In addition, where it is credibly proven that ingroup favoritism norms prevail in the key role regulator's social environment, it is advisable to grant some probative weight to such social norms. Assigning a probative weight to regulators' subjective intentions and relevant norms is justified by the significant influence of intentions and norms on the prospects of discriminatory behavior.

The article highlights three principal types of regulators' mindsets: mindful, mindless, and bias-resisting. Mindful regulators deliberately intend to restrict internal sale of foreign goods through discriminatory measures. Mindless regulators do not aim to discriminate against imported goods, and the disparate impact influences of their regulations are relegated to the background. Bias-resisting regulators intend to grant equal treatment to domestic and imported products and resist ingroup biases.

Maria Von Hofmannsthal Chair in International Law and Co-Director of the International Law Forum, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem. This article was first presented at the Workshop on “Behavioral Approaches to International Law”, which was organized as part of the project HRNUDGE funded by the ERC (Grant Agreement 803981, PI Veronika Fikfak) and as part of the ‘Afterlife of Cases’ project funded by the Leids Universiteits Fonds/Dr HA van Beuningen Fonds (www.luf.nl) (PI Daniel Peat). I am grateful to the participants in these workshops for their valuable comments. I am particularly indebted to Anne van Aaken, Jonathan Kolie, Harlan Grant Cohen, and Sungjoon Cho who provided detailed and helpful comments on earlier versions of this article.

© The Author(s), 2022. Published by Cambridge University Press on behalf of the *German Law Journal*. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

Keywords: International law; international economic law; social cognition; behavioral economics; cognitive sociology; World Trade Organization; national treatment; social psychology; international human rights law

A. Introduction

Decision-making processes leading to governmental measures affecting trade involve various socio-cognitive processes and biases. The legal prohibition of discrimination against imported products constitutes a fundamental principle of World Trade Organization (WTO) law, and notwithstanding multiple prohibitions against employing national measures to discriminate against imported goods—“national treatment” obligations¹—in WTO law,² discrimination against foreign products is widespread.³ International trade law literature generally overlooks or underestimates the socio-cognitive processes and biases that often underpin discrimination against imported products. This study is aimed at exploring the potential contribution of social cognitive studies—primarily cognitive psychology, social psychology, and cognitive sociology—to international trade literature concerning the “national treatment” obligation. Social cognitive studies constitute a valuable tool to gain better understanding of pervasive trade discrimination and can generate insights regarding certain legal strategies to cope with discrimination against foreign products.⁴ Discrimination against imported goods also involves rational and political factors, and socio-cognitive analysis of this multifaceted phenomenon is not a substitute for other modes of analysis.

One of the most contested issues regarding GATT Article III relates to the role of regulators’ intent in establishing a breach of the national treatment obligation. It is common to distinguish between *objective intention* manifested in the regulatory measure itself (revealed, for example, from the design and the structure of a measure) and *subjective intention*, discerned from a variety of sources, such as regulators’ statements.⁵ The current approach undertaken by the WTO Appellate Body is characterized by adopting the objective test for regulators’ intentions and a reluctance to take into account regulators’ subjective intentions and ingroup favoritism norms.⁶ This approach can be explained by adjudicators’ concerns regarding the difficulty of engaging with elusive subjective factors, and this inclination is particularly understandable in a community of experts marked by rational economic thinking. In contrast to the approach adopted by the WTO’s Appellate Body, this contribution suggests that WTO tribunals openly and seriously consider regulators’ intentions manifested in both “objective” evidence (revealed from the regulatory measure itself) and “subjective” evidence (revealed from a broad range of additional items of evidence). Thus, once presented with credible evidence, it is advisable that WTO adjudicators assign adequate probative weight to regulators’ intentions manifested in both the regulatory measure itself and the surrounding circumstances, as well as to relevant social norms prevailing in the particular key role regulator social environment. As elaborated below, assigning a probative weight to regulators’ subjective intentions and relevant norms is justified by the significant influence of intentions, related biases and norms on the prospects of discriminatory behavior. The significance

¹The principle of non-discrimination is also reflected in the “most-favored nation” principle (Article I of the General Agreement on Tariffs and Trade (GATT)) but this contribution is focused on discrimination favoring domestic products vis-à-vis imported ones (resulting in a violation of GATT Article III).

²This prohibition is included, for example, in Article III of the General Agreement on Tariffs and Trade (GATT), Article 2.1 of the Agreement on Technical Barriers to Trade, and Article 2.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

³See, e.g., PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 342 (4th ed. 2017); SIMON LESTER, BRYAN MERCURIO, & ARWEL DAVIES, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 274 (3d ed. 2018).

⁴Discrimination against imported products may involve discriminatory behavior undertaken by various actors, prominently, governmental officials, producers, retailers, and consumers. This contribution focuses on governmental decision-makers and the regulations they establish.

⁵On the distinction between “subjective” and “objective” intentions, see, e.g., LESTER, MERCURIO & DAVIES, *supra* note 3, at 260.

⁶See *infra* Part B.

of regulators' intentions is not limited to objective intentions revealed in the regulatory measure itself but rather applies also to subjective intentions discerned from a variety of other types of evidence. Ascertaining regulators' subjective intentions and favoritism norms presents WTO tribunals with some difficulties, but tribunals in other fields cope with similar challenges.

The following discussion on three principal types of regulators⁷ mindsets highlights regulators' intentions, their susceptibility to influence by certain cognitive biases, and ingroup favoritism norms. *Mindful regulators* deliberately intend to restrict internal sale of imported goods through discriminatory measures; they are aware that their intention is discriminatory, but are often unaware that this motivation engages some cognitive biases tending to further exacerbate discrimination. *Mindless regulators* do not aim to discriminate against imported goods, and the disparate impacts of their regulations are relegated to the background. Such regulators are commonly influenced by sociocultural factors, like ingroup favoritism norms, and related cognitive biases. *Bias-resisting regulators* intend to grant equal treatment to domestic and imported products and resist ingroup biases; while they consciously aim at applying equal regulatory treatment, their decision-making process often involves some less conscious elements which are more vulnerable to socio-mental biases. The discussion on these three types of regulators' mindsets highlights some features of discrimination against foreign goods and is accompanied by certain recommendations for the WTO tribunals.

The contribution is focused on GATT Article III which embodies the central legal provision regarding "national treatment", and Part B introduces the central elements of this Article. Part C briefly outlines some key insights gained from social cognitive and sociological literature relating to human discrimination. Following a discussion on close links between ingroup favoritism and discriminatory tendencies against imported products, Part D addresses three principal mindsets of key role government officials engaged in shaping national regulations applied to domestic and imported goods—mindful, mindless, and bias-resisting regulators. The discussion on each mindset highlights some aspects of discrimination against imported goods and suggests a legal strategy to cope with such discrimination. Part E briefly addresses some practical difficulties relating to detecting regulators' subjective intentions and biases that are often associated with "mind-reading"—attempts to detect other people's mental state. Part F concludes.

B. The National Treatment Obligation in GATT Law

GATT Article III embodies the national treatment obligation that applies to internal governmental measures, and their scrutiny by GATT/WTO tribunals has generated concerns regarding unjustified intrusion into states' legitimate regulatory space.⁸ Thus, it is unsurprising that GATT Article III is one of the most contentious provisions of the GATT. The case-law interpreting the elements of Article III law is not always clear⁹ and some of its components are unsettled. Article III includes a general statement of the non-discrimination obligation, Article III:1, and two main operative obligations: Article III:2 prohibits *tax* discrimination and Article III:4 bans using *non-tax* regulatory measures discriminating against imported products. This section is not intended to provide a comprehensive review of GATT/WTO jurisprudence in this complex field but rather to succinctly expose the main legal provisions and expand on the role of regulators' intent.

⁷The term "regulators" refers in this contribution to regulators and legislators involved in shaping regulatory rules affecting international trade. Similarly, the terms "regulation" and "regulatory measures" refer in this contribution to diverse governmental regulations and legislative measures affecting international trade.

⁸See, e.g., Henrik Horn & Joseph H. H. Weiler, *EC – Asbestos European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, 3 WORLD TRADE REV. 129, 132–33 (2004).

⁹See, e.g., ANDREW D. MITCHELL, DAVID HEATON, AND CAROLINE HENCKELS, NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW 75 (2016). On the ambiguity of GATT provisions regarding discrimination and WTO discursive processes that may clarify such vague provisions, see Sungjoon Cho, Jacob Radecki & Cecilia Suh, *Communitizing Transnational Regulatory Concerns*, 18 CHI. J. INT'L L. 48, 58–59 (2017).

GATT Article III:1 lays down the general non-discrimination principle informing the remaining provisions of Article III.¹⁰ The WTO Appellate Body clarified that Article III mandates WTO members to provide equality of competitive conditions for imported and locally manufactured products.¹¹ Actual trade volumes are not protected by Article III. The provision applies to both actual and potential discrimination, direct and indirect discrimination, and formally even-handed but *de facto* discriminatory measures.¹² Article III:1 provides that internal taxes and regulations affecting internal sale should not be applied to imported or domestic products “so as to afford protection to domestic production”; this phrase involves the contested question regarding regulatory intent and it is discussed below with regard to tax measures as well as non-tax regulatory measures.

GATT Article III:2 prohibits discrimination against imported goods through the employment of tax measures and it contains two separate sentences: The first sentence bans tax discrimination between like products, and the second sentence prohibits tax discrimination between directly competitive or substitutable goods. The first sentence requires the examination of three questions: (i) Whether the particular measure is an internal tax or other charge applied to products; (ii) whether the imported and domestic products are “like” products; and (iii) whether imported goods are taxed in excess of domestic products.¹³ The first element concerns “internal tax or other charges applied to products,” and the second component focuses on “like” products. “Likeness”¹⁴ is determined according to the product’s end-uses in a given market, consumers’ tastes and habits, as well as the products’ properties, nature, and quality.¹⁵

The role of intent of regulators was addressed in some decisions concerning the “aims and effects” doctrine, prominently in the context of determining “likeness” under the first sentence of Article III:2.¹⁶ In the early 1990s, two GATT panels developed the approach under which “likeness” is found if the aim and effect of the particular measure were to protect the local products.¹⁷ The “aims and effects” test was later rejected in the Panel Report in *Japan – Alcoholic Beverages II*¹⁸ and the Appellate Body implicitly confirmed this conclusion.¹⁹ Though the “aims and effects”²⁰ doctrine was formally rejected, some well-known experts observe that “it would seem that its demise has been less complete than one would think when reading the pertinent Appellate Body Report.”²¹

¹⁰Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, para. 19, WTO Doc. WT/DS8/AB/R, WT/DS1011/AB/R, 4 (adopted October, 4 1996).

¹¹*Id.*, at para. 16.

¹²MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVROIDIS, MICHAEL HAHN, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 183–84 (3d ed. 2015).

¹³BOSSCHE & ZDOUC, *supra* note 3, at 351–64, 413; LESTER, MERCURIO & DAVIES, *supra* note 3, at 266–77; MICHAEL TREBILCOCK & JOEL TRACHTMAN, ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW 59–60 (2020).

¹⁴The concept of “likeness” under the first sentence of Article III:2 is interpreted narrowly because the broader concept of “directly competitive or substitutable products” is employed in the second sentence of Article III:2. BOSSCHE & ZDOUC, *supra* note 3, at 355; LESTER, MERCURIO & DAVIES, *supra* note 3, at 269.

¹⁵In addition, if the product’s tariff classification is sufficiently detailed, it can constitute a helpful indication of product similarity. Appellate Body, *Japan–Alcoholic Beverages*, *supra* note 10, at paras. 20–21.

¹⁶See, e.g., BOSSCHE & ZDOUC, *supra* note 3, at 362.

¹⁷See Panel Report, *US–Taxes on Automobiles*, paras. 5.9–10 (unadopted), DS31/R, (October 11, 1994); Panel Report, *US–Malt Beverages*, paras. 5.25–26, DS23/R - 39S/206 (adopted June 19, 1992).

¹⁸See Panel Report, *Japan–Taxes on Alcoholic Beverages*, paras. 6, 16, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted July 11, 1996). See also BOSSCHE & ZDOUC, *supra* note 3, at 362.

¹⁹See Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 10, at 23. See also BOSSCHE & ZDOUC, *supra* note 3, at 362.

²⁰Regulatory intent can also be considered under GATT Article XX, addressing general exceptions. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. XX [hereinafter GATT].

For a discussion of whether the regulatory purpose should be examined in the context of GATT Article III:2/III:4 or GATT Article XX, see Horn & Weiler, *supra* note 8, at 143–44; MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 169–70 (4th ed. 2013).

²¹Matsushita et al., *supra* note 12, at 186 (and see the decisions cited at 186–187). See also TREBILCOCK, HOWSE & ELIASON, *supra* note 20, at 149. Trebilcock and Trachtman observe that “[h]owever, in a number of contexts, the Appellate Body seems to have accepted the need to evaluate aims and effects. For example, it appears to have adopted something like an objective test of legislative intention in the second Japan Alcoholic Beverages case” TREBILCOCK & TRACHTMAN, *supra* note 13, at 65.

The third element is related to the question of whether the imported goods are taxed in excess of domestic products. The prohibition of discriminatory taxation is not conditioned upon the effects of the particular measure on trade flows; it rather protects expectations of equal competitive relationship.²²

The second sentence of Article III:2 prohibits the imposition of internal taxation on imported and domestic measures in a manner contrary to the principles set out in Article III:1. The interpretative note to this sentence clarifies that the obligation is breached in cases where competition is involved between the taxed product and a “directly competitive or substitutable product,” and the two products are not similarly taxed. Thus, to establish a violation of this provision, it is necessary to show that (i) the particular measure is an internal tax or charge applied to products; (ii) the imported and domestic goods are directly competitive or substitutable; (iii) the products are dissimilarly taxed; and (iv) that the dissimilar taxation is applied “so as to afford protection to domestic production.”²³

The first element of “internal tax or charge” is discussed above in the context of the first sentence of Article III:2.²⁴ The second element of “directly competitive or substitutable” refers to a broader concept than “like” products established under the first sentence of Article III:2.²⁵ Products are considered “directly competitive or substitutable” when they are interchangeable or when they offer alternative ways of satisfying a particular need or taste of customers.²⁶ The third element concerns “dissimilar” taxation and it focuses on the disparate effect of the tax measures on imported products, compared to domestic ones.²⁷

The fourth element of the second sentence of Article III:2 requires establishing that the dissimilar taxation is applied “so as to afford protection to domestic products.”²⁸ This requirement brings to the fore the issue of regulatory intent underlying the particular tax measure. The WTO Appellate Body ruled that in examining the element of “so as to afford protection,” it is not necessary to consider the subjective intent of regulators or legislators.²⁹ Tribunals should rather apply an objective test of regulatory intention and examine the purpose of the legislature to the extent that it is given objective expression in the legislation itself. The Appellate Body stated in the *Japan – Alcoholic Beverages* case that: “Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.”³⁰ Notwithstanding this statement, some experts noted that in certain cases, the Appellate Body made apparent reference to subjective intent considerations,³¹ and that it is likely that some tribunals would take into account, implicitly or explicitly, some evidence regarding subjective intentions.³²

GATT Article III:4 concerns non-tax regulatory measures and to establish a violation of this provision, three elements must be satisfied: (i) The imported and domestic products are “like products”; (ii) the challenged regulatory measure is a law or regulation affecting the products’ internal sale, transportation or use; and (iii) the imported products are accorded “less favorable” treatment than that accorded to like domestic products.³³ The first element concerns “likeness,”

²²See generally Matsushita et al., *supra* note 12, at 200; BOSSCHE & ZDOUC, *supra* note 3, at 364.

²³LESTER, MERCURIO & DAVIES, *supra* note 3, at 272–85; See also BOSSCHE & ZDOUC, *supra* note 3, at 365–76, 413.

²⁴On this element, see BOSSCHE & ZDOUC, *supra* note 3, at 366.

²⁵Matsushita et al., *supra* note 12, at 201–02.

²⁶BOSSCHE & ZDOUC, *supra* note 3, at 368.

²⁷LESTER, MERCURIO & DAVIES, *supra* note 3, at 281–82.

²⁸This requirement is set out in Article III:1 and the application of this criterion in the second sentence of Article III:2 derives from the explicit reference here to “in a manner contrary to the principles set forth in paragraph 1.” GATT, Arts. III.1–III.2.

²⁹See, e.g., Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 10, at 27–28; Appellate Body Report, *Chile–Taxes on Alcoholic Beverages*, para. 62, WTO Doc., WT/DS87/AB/R, WT/DS110/AB/R, (adopted December 13, 1999).

³⁰Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 10, at 29.

³¹LESTER, MERCURIO & DAVIES, *supra* note 3 at 281, 284. See also BOSSCHE & ZDOUC, *supra* note 3, at 376.

³²Lester, Mercurio & Davies, *supra* note 3, at 284.

³³See Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, para. 133, WTO Doc., WT/DS161/AB/R, WT/DS169/AB/R, (adopted December 11, 2000). See also MATSUSHITA ET AL., *supra* note 12, at 205–10.

and the determination of “like products” focuses on the extent of competitive relationships between the imported and domestic products.³⁴ The second element regarding “law or regulation affecting internal sale, transportation or use” applies to all governmental measures that may adversely modify competition between imported and domestic goods.³⁵ The third element refers to “treatment less favorable” and it requires effective equality of opportunities for imported products to compete with like domestic goods.³⁶ If the particular governmental measure has a detrimental effect on the conditions of competition (and not necessarily on actual trade effects) that detrimental impact will amount to a less favorable treatment.³⁷

Though Article III:4 does not explicitly refer to the general principles set out in Article III:1, the Appellate Body ruled that Article III:4 should be harmoniously interpreted in light of the principles of Article III:1, including the criterion of “so as to afford protection”³⁸ regarding regulatory intent.

The above discussion indicates that the practical role of regulators’ subjective intentions in establishing a breach of Article III has not been finally settled. Though the Appellate Body is generally reluctant to consider regulators’ subjective intentions (which are not revealed in the regulatory measure itself), some experts observed that it is likely that some WTO tribunals will take into account evidence regarding regulators’ subjective intentions, either explicitly or implicitly.³⁹

C. Socio-Cognitive Process, Biases, and Discrimination

Discrimination is widespread in daily life and some cognitive mechanisms (and biases) feed and reinforce discriminatory behavior.⁴⁰ These mental processes are often infused with sociocultural factors, such as norms or socialization.⁴¹ Numerous social cognitive studies have examined diverse processes and biases involved in discrimination between human beings (for example, racial or gender discrimination)—and while human and trade discrimination should not be equated, a significant part of studies on human discrimination may shed light on trade discrimination. As elaborated below, the link between human and trade discrimination is notable in social psychological literature on intergroup relations. Sociological studies are also pertinent to discrimination between goods manufactured by local and foreign workers, prominently scholarship concerning “loyalty” norms, socialization, and social control mechanisms. This section briefly outlines key insights arising from social cognitive scholarship applicable to discrimination between imported and domestic products.

Human beings strive to belong to social groups and have the tendency to differentiate themselves by group membership.⁴² When individuals categorize themselves as group members, the

³⁴BOSSCHE & ZDOUC, *supra* note 3, at 383.

³⁵BOSSCHE & ZDOUC, *supra* note 3, at 378.

³⁶See Appellate Body Report, *EC–Seal Products*, para. 5.101, WTO Doc., WT/DS400/AB/R, WT/DS401/AB/R, (adopted May 22, 2014).

³⁷See *Id.* at paras. 5.101, 5.82.

³⁸Appellate Body Report, *EC–Measures Affecting Asbestos*, para. 98, WTO Doc., WT/DS135/AB/R, (adopted March 12, 2001).

³⁹On the role of regulators’ subjective intentions in establishing a breach of GATT Article III, see also the discussion, *infra* Part D(II).

⁴⁰See, e.g., Moshe Hirsch, *Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law*, 30 EUR. J. INT’L L. 1319, 1328–38 (2019). Discriminatory behavior is often related also to rational factors. On the impact both economic and social factors on trade protectionist tendencies, see Anna Maria Mayda & Dani Rodrik, *Why Are Some People (and Countries) More Protectionist Than Others?* 49 EUR. ECON. REV. 1393, 1418 (2005).

⁴¹On the influence of sociocultural factors on cognitive processes, see Eviatar Zerubavel, *Cognitive Sociology: Between the Personal and the Universal Mind*, in THE OXFORD HANDBOOK OF COGNITIVE SOCIOLOGY 31–37 (Wayne H. Brekhus & Gabe Ignatow eds., 2019); WAYNE H. BREKHUS, CULTURE AND COGNITION: PATTERNS IN THE SOCIAL CONSTRUCTION OF REALITY 1–4 (2015); SUSAN FISKE & SHELLEY TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 27 (3d ed. 2018); KATHLEEN GALOTTI, COGNITIVE PSYCHOLOGY: IN AND OUT OF THE LABORATORY 396 (6th ed. 2018).

⁴²See MARILYNN BREWER, INTERGROUP RELATIONS 103, 120 (2d ed., 2009); ELLIOT ARONSON, THE SOCIAL ANIMAL 27–28 (11th ed. 2012). See also RICHARD JENKINS, SOCIAL IDENTITY 120 (4th ed. 2014). On social identity and international law, see MOSHE HIRSCH, INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW 104 (2015).

ingroup becomes integrated with the self and individuals come to recognize the characteristics of the ingroup as representing part of themselves.⁴³ The intergroup context emerges when social identities are salient and individuals interact with one another in terms of these social group identities.⁴⁴ As famously shown by Tajfel and his colleagues, the mere perception of belonging to two distinct groups is sufficient to provoke intergroup responses by ingroup members.⁴⁵ Empirical studies have persuasively demonstrated that once people identify with a particular social group, they are likely to provide ingroup members better treatment.⁴⁶ Intergroup discrimination is frequently motivated by positive favoritism toward ingroup members rather than by direct hostility towards outgroup members.⁴⁷ This discriminatory tendency is also discerned in settings characterized by the absence of any history of intergroup contact or conflict.⁴⁸

Generally, ingroup members are believed to be trustworthy, cooperative, peaceful, and honest; whereas outgroup members are often perceived as untrustworthy, competitive, quarrelsome, and dishonest.⁴⁹ Group affiliation also tends to affect the radius of one's "moral circle",⁵⁰ suggesting that members of a particular group readily excuse unfair acts if the transgressors belong to the subject's group.⁵¹ Intergroup attitudes and behavior can be activated without full awareness, and subliminal priming⁵² (for example, by using certain vocabulary) is often sufficient to elicit typical inter-group responses.⁵³ Ingroup favoritism is often facilitated and supported by sociological factors and processes, such as social construction of certain categories ("the way we classify the world")⁵⁴ and norms guiding a group's members to provide preferential treatment to ingroups.⁵⁵ Community members are commonly socialized to norms of "loyalty"⁵⁶ and pressured by social

⁴³See Jim A.C. Everett, Nadira S. Faber, & Molly Crockett, *Preferences and Beliefs in Ingroup Favoritism*, 9 FRONTIERS BEHAV. NEUROSCIENCE 1, 2 (Article No. 15, 2015). See also Jan Stets, Shane R. Thye, & Edward J. Lawler, *Getting Identity Right*, 37 ADVANCES GRP. PROCESSES 191, 197–98, 200 (2020).

⁴⁴See, e.g., Everett, Faber, & Crockett, *supra* note 43, at 1; Jan Stets, Peter J. Burke, Richard T. Serpe & Robin Stryker, *Getting Identity Right*, 37 ADVANCES IN GROUP PROCESSES 191, 200, 205–206 (2020).

⁴⁵Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7, 9 (Stephen Worchel ed., 1986).

⁴⁶See WALTER STEPHAN & COOKIE W. STEPHAN, INTERGROUP RELATIONS 92–93 (1996); Brewer, *supra* note 42, at 43. See also Jenkins, *supra* note 42, at 8.

⁴⁷See Brewer, *supra* note 42, at 21, 65–68. See also John F. Dovidio & Samuel L. Gaertner, *Stereotypes and Evaluative Intergroup Bias*, in AFFECT, COGNITION AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION 167, 175 (Diane M. Mackie & David L. Hamilton eds., 1993).

⁴⁸See Brewer, *supra* note 42, at 26, 45. Though group identity clearly tends to generate certain discriminatory biases, these tendencies are not uniform, and cultural variations across social groups influence the type and extent of discrimination along certain lines. Ronald Fischer & Crysta Derham, *Is In-Group Bias Culture-Dependent? A Meta-Analysis Across 18 Societies*, 5 SPRINGERPLUS 70 (2016). Group affiliation does not always result in negative attitudes vis-à-vis outgroup's members and the content of such attitudes can be either positive (for example, admiration) or negative (for example, viewing them as untrustworthy). On the "stereotype content model" and cross-cultural variances, see Susan T. Fiske, *Intergroup Biases: A Focus on Stereotype Content*, 3 CURRENT OP. BEHAV. SCI. 45 (2015).

⁴⁹See Brewer, *supra* note 42, at 51. See also FISCHE & TAYLOR, *supra* note 41, at 54.

⁵⁰On "moral circle" and social identity, see generally Stefano Passini, *What Do I Think of Others in Relation to Myself?* 23 J. COMMUNITY & APPLIED PSYCHOLOGY 261 (2013).

⁵¹Piercarlo Valdesolo & David DeSteno, *Moral Hypocrisy, Social Groups and the Flexibility of Virtue*, 18 PSYCH. SCI. 869, 870 (2007).

⁵²Generally, subliminal priming occurs when a concept is activated by the environment, but at exposure times is below conscious awareness. See Fiske & Taylor, *supra* note 41, at 35.

⁵³SAUL KASSIN, STEVEN MARKUS & HAZEL R. MARKUS, SOCIAL PSYCHOLOGY 141–42, 150 (2008).

⁵⁴EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY 53 (1997).

⁵⁵Thomas F. Pettigrew, *Prejudice and Discrimination*, in 18 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 828, 831 (2d ed., 2015); Everett, Faber, & Crockett, *supra* note 43, at 8.

⁵⁶For a perceptive analysis of the concept "loyalty" in world politics and its close links with affective attachment and shared identity, see generally Lauge N. Skovgaard Poulsen, *Loyalty in World Politics*, 26 EUR. J. INT'L REL. 1156 (2020).

control mechanisms to comply with those norms.⁵⁷ As Crandall, Eshleman, and O'Brien conclude in their study on social norms and prejudice against other groups' members: "Social norms are powerful predictors of attitudes and behaviors, and prejudice and discrimination are no exception."⁵⁸

D. Three Regulators' Mindsets and Trade Discrimination

I. Ingroup Favoritism and Trade Discrimination

Government regulators adopt diverse measures affecting the sale and consumption of domestic and imported products, including tax measures, marketing restrictions, or environmental standards. Decision-making processes leading to such regulations commonly involve various socio-cognitive processes, such as categorization, risk perception, and interpreting information concerning the relevant products. In addition, public regulation influencing trade is developed in a social environment and is frequently influenced by sociocultural factors and processes such as norms, identity, and socialization.

Though not all social cognitive studies concerning discrimination between humans are applicable to discrimination between products in international trade, one type of trade discrimination is notably pertinent to these studies – the above-discussed national treatment principle that prohibits granting preferential treatment to locally manufactured goods (to the detriment of imported products). Ample studies have pointed out that ingroup bias affects behavior in the economic realm.⁵⁹ Mansfield and Mutz have shown that perceptions of trade's impact on the nation as a whole (as well as out-group anxiety) affect attitudes toward trade.⁶⁰ More importantly, empirical studies⁶¹ have shown that ingroup favoritism is significantly correlated with attitudes concerning international trade. Mutz and Kim have demonstrated that nationalistic sentiments are related to attitudes towards trade preferences,⁶² and that "compatriotism"⁶³ is pertinent to attitudes regarding trade policy. Compatriotism clearly enhances people's support for trade policy benefiting their own country, comparing to their support of trade policy generating benefits to other trading countries' citizens.⁶⁴ Favoring local producers because they are fellow citizens appears to be highly socially acceptable.⁶⁵

Government officials entrusted with preparing regulatory measures affecting trade are often senior government workers who have served their country for long periods, identify with their country, and aspire to promote its national economy.⁶⁶ Though it is not possible to precisely attribute a set of intentions and related socio-cognitive features to a group of decision-makers, it is possible to identify three approximate mindsets of regulators playing a key role in shaping regulatory measures affecting trade. The three major mindsets discussed below refer to regulators' intentions towards discrimination against imported goods and their susceptibility to influence by social factors, such as norms or socialization, and related biases: Mindful, mindless, and

⁵⁷Chris Crandall, Amy Eshleman & Laurie L. O'Brien, *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. PERSONALITY & SOC. PSYCH. 359–60 (2002). See also Everett, Faber, & Crockett, *supra* note 43, at 13. On the interaction between group identity and conforming to norms, see Jenkins, *supra* note 42, at 152, 158.

⁵⁸Crandall, Eshleman & O'Brien, *supra* note 57, at 376.

⁵⁹See, e.g., Moses Shayo, *Social Identity and Economic Policy*, 12 ANN. REV. ECON. POL'Y 355, 362 (2020).

⁶⁰Edward D. Mansfield & Diana C. Mutz, *Support for Free Trade: Self-Interest, Sociotropic Politics and Out-Group Anxiety*, 63 INT'L ORG. 425, 451–52 (2009).

⁶¹On the impact of non-rational factors, including group identity and out-group aversion, on preferences with regard to trade policy, see also José M. Reis & Anne van Aaken, *Framing Trade*, in this Special Issue, at 7 (referring to "Behavioral models of trade preferences" and Mansfield & Mutz).

⁶²Diana C. Mutz & Eunji Kim, *The Impact of Ingroup Favoritism on Trade Preferences*, 71 INT'L ORG. 827, 829 (2017).

⁶³"Compatriotism" refers to the tendency to favor ingroup members because they are citizens of the same country. See *Id.* at 830.

⁶⁴See *Id.* at 845–46. On the influence of social values, identities, and economic factors, on trade protectionism tendencies, see Mayda & Rodrik, *supra* note 40, at 1418.

⁶⁵See Mutz & Kim, *supra* note 62, at 840.

⁶⁶See *infra* Part D(III).

bias-resisting regulator. As elaborated below, these intentions and susceptibility to bias are likely to influence regulators' cognitive processes and their inclination to grant favorable treatment to domestic products.

II. The Mindful Regulator

Mindful regulators are aware of competitive relationships between imported and domestic products and they primarily intend to restrict internal sale of foreign goods through discriminatory measures. Intended cognitive processes and behavior represent one of the highest points on the automatic-controlled scale.⁶⁷ Generally, intentional thought is characterized by having options, a belief regarding capacity to implement the intention, and enacting it by paying attention to implementing the particular intent.⁶⁸ Mindful regulators are also often influenced by ingroup favoritism norms prevailing in their society. The image of mindful regulators is pervasively present in mainstream WTO legal literature and they are commonly perceived as rational players. Mindful regulators present some significant features of rational actors⁶⁹ but it is well-known in behavioral international law and economics scholarship that they are prone to diverse cognitive biases.⁷⁰

Mindful regulators are aware of their intention to discriminate but are often unaware that this motivation frequently engages some biases tending to *exacerbate discrimination* against foreign products. Regulatory decision-making commonly involves seeking, collecting, interpreting, assessing the reliability of information regarding the particular products, and weighing alternative regulatory measures. Social cognitive studies reveal that motivations are likely to bias information processing in a way that steers decision-makers towards their desired goals.⁷¹ “Confirmation bias” refers to a less consciously one-sided case-building process, involving selective acquisition and interpretation of information in ways that support previously established beliefs.⁷² For example, when having to process large amounts of data, people often direct their attention to information confirming the desired conclusion and overlook information undermining their desired conclusion.⁷³ Expectancy-confirming information is better remembered than expectancy-disconfirming information.⁷⁴ Thus, mindful regulators are likely to be influenced by confirmation bias, inducing them to seek new evidence that supports their discriminatory goals and interpret available data in a manner which promotes their goal of discriminating against imported products. This bias is expected to further intensify discriminatory results for foreign products—*more* than planned by such regulators.

Mindful regulators are concerned about threats posed by imported products to local producers. Studies concerning the “availability heuristic” indicate that people tend to judge probabilities

⁶⁷On the varieties of automatic and controlled cognitive processes, see FISKE & TAYLOR, *supra* note 41, at 34. On the dynamic graded continuum in this sphere, see Magda Osman, *An Evaluation of Dual Process Theories of Reasoning*, 11 PSYCHONOMIC BULL. & REV. 988, 993–95 (2004).

⁶⁸See generally FISKE & TAYLOR, *supra* note 41, at 44; See also Jodie A. Baird & Janet Wilde Astington, *The Development of the Intention Concept: From the Observable World to the Unobservable Mind*, in THE NEW UNCONSCIOUS 256–57 (Ran R. Hassin, James S. Uleman, John A. Bargh, eds., 2006).

⁶⁹Mindful regulators present some significant features of rational actors but as discussed below, their behavior is often also influenced by social factors (for example, “loyalty” norms) and certain cognitive biases, for examples (e.g., confirmation bias).

⁷⁰See, e.g., Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 426 (2014); Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1114–19 (2015).

⁷¹See, e.g., Brent L. Hughes & Jamil Zaki, *The Neuroscience of Motivated Cognition*, 19 TRENDS IN COGNITIVE SCI. 62, 62–64 (2015).

⁷²See R. S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175–90 (1998). On confirmation bias in wartime investigations, see Shiri Krebs, *The Invisible Frames Affecting Wartime Investigations: Legal Epistemology, Metaphors, and Cognitive Biases*, in INTERNATIONAL LAW'S INVISIBLE FRAMES: SOCIAL COGNITION AND KNOWLEDGE PRODUCTION IN INTERNATIONAL LEGAL PROCESSES 4.2 (Andrea Bianchi & Moshe Hirsch eds., 2021).

⁷³See Hughes & Zaki, *supra* note 71, at 62–63.

⁷⁴See generally Jack Fyock & Charles Stangor, *The Role of Memory Biases in Stereotype Maintenance*, 3 BRIT. J. SOC. PSYCH. 331 (1994).

based on how quickly particular instances or risks come to their mind.⁷⁵ Being preoccupied with the threat expected from imported goods to domestic manufacturers, mindful regulators are likely to overestimate the probability and adverse effects of import competition, and establish discriminatory measures that harm imported products *more* than they intend.

The WTO law: An examination of the GATT/WTO jurisprudence indicates that the practical role of regulators' intent in establishing a violation of Article III has not been finally settled. The element of discriminatory intent resurfaces in each of the three provisions of Article III discussed above; either in the context of the "aims and effects" doctrine relating to tax measures (under the first sentence of Article III:2) or in the context of "so as to afford protection" relating to non-tax measures (under Articles III:1 and III:4).⁷⁶ The WTO Appellate Body rejected the "aims and effects" test adopted by previous tribunals' decisions concerning the need to examine regulators' subjective intentions.⁷⁷ Some well-known scholars noted, however, that certain WTO tribunals continue to take into account the intention of regulators discerned from various objective and subjective statements or documents.⁷⁸ More importantly, with regard to the Appellate Body's rejection of the role of subjective intention under the notion of "so as to afford protection" in the second sentence of Article III:2, Lester, Mercurio and Davies observe:

However, it should be noted in an earlier case, the Appellate Body did make apparent reference to these kinds of subjective intent considerations, although it is not clear what weight they were given. *Regardless of whether subjective intent is a formal part of the standard, it is likely that some panels will take such evidence into account nonetheless, either explicitly or implicitly.*⁷⁹ [Emphasis added]

The ambivalent approach undertaken by GATT/WTO tribunals regarding regulators' subjective intent can be explained by the tension between two inconsistent tendencies. On the one hand, WTO tribunals' rejection of the role of subjective intent reflects disquiet concerning difficulties in discerning regulators' subjective intentions,⁸⁰ and an aversion⁸¹ towards psychological factors particularly ingrained in a community of experts characterized by rational economic thinking.⁸² On the other hand, human beings have an inescapable inclination to "mindreading," trying to detect other people's mental state, for making sense and navigating the social world.⁸³ The

⁷⁵See FISKE & TAYLOR, *supra* note 41, at 192; See also DANIEL KAHNEMAN, THINKING FAST AND SLOW 138 (2012); GALOTTI, *supra* note 41, at 315–17.

⁷⁶See *supra* Part B.

⁷⁷See *supra* Part B.

⁷⁸With regard to the "aims and effects" doctrine, see TREBILCOCK, HOWSE & ELIASON, *supra* note 20, at 149; TREBILCOCK & TRACHTMAN, *supra* note 13, at 65; MATSUSHITA ET AL., *supra* note 12, at 186. With regard to phrase of "so as to afford protection," see MITCHEL, HEATON, AND HENCKELS, *supra* note 9, at 77.

⁷⁹LESTER, MERCURIO & DAVIES, *supra* note 3, at 284.

⁸⁰For example, the Appellate Body explained in Appellate Body Report, *Chile–Taxes on Alcoholic Beverages*: "The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters," *supra* note 29, at para. 62. See also Appellate Body Report, *Japan Alcoholic Beverages*, *supra* note 10, at 27–28. See also MATSUSHITA ET AL., *supra* note 12, at 188.

⁸¹Hudec, for example, explains that inquiring into the subjective motive of legislators and regulators is "traditionally a no-man's-land for courts." Robert Hudec, *GATT Constraints on National Regulation: Requiem for an 'Aim and Effects' Test*, 32 INT'L LAW. 623, 642 (1998).

⁸²For a discussion on the WTO tribunals' interpretation of Article III as inspired by economic concepts, see ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM 261–64 (2011). On the development of the objective-neutral approach in the WTO system, see *Id.* at 252.

⁸³On mindreading as key cognitive processes for social interaction and communication, see IAN APPERLY, MINDREADERS: THE COGNITIVE BASIS OF THEORY OF MIND 1 (2010). On the "inescapable inclination" to understand others in terms of their mental processes, see MATTHEW D. LIBERMAN, SOCIAL: WHY BRAINS ARE WIRED TO CONNECT 106 (2013). On the significant influence of fairness intention on reciprocal behavior, see Armin Falk, Ernst Fehr & Urs Fischbacher, *Testing Theories of Fairness—Intentions matter*, 62 GAMES & ECONOMIC BEHAVIOR 287 (2008).

inclination to seek understanding of the content of others' minds develops early in life and is virtually an automatic process.⁸⁴ These two inconsistent tendencies can explain why some WTO tribunals, though formally guided by the Appellate Body's repudiation of the role of regulators' subjective intentions, are still likely to seek information regarding regulators' intentions in diverse sources (and not only in the regulatory measure itself) and be influenced by such evidence.

Cognitive processes often steer behavior,⁸⁵ and a discriminatory intention increases the likelihood of discriminatory behavior.⁸⁶ The significance of regulators' intentions is not limited to "objective" intentions revealed in the regulatory measure itself, but rather also applies to "subjective" intentions discerned from a variety of other types of evidence.

Thus, where it is credibly proven—either by objective evidence related to the regulatory measure itself or by subjective items of evidence—that such a discriminatory intentioned⁸⁷ regulator played a key role in the decision-making leading to the challenged regulatory measure,⁸⁸ it is desirable to assign it a significant probative weight,⁸⁹ (reinforcing a finding of a breach of Article III). Granting a significant probative weight to evidence regarding key role regulators' intentions⁹⁰ manifested in various sources (alongside additional factors)⁹¹ is justified not only by the above-noted significant impact of intentions on behavior but also by biases related to motivated cognition. As previously mentioned, once decision-makers intend to discriminate against foreign products, that motivation often engenders confirmation and availability biases which are likely to affect the collection, interpretation, and assessment of information in a way that increases the prospects of discrimination. In such cases, it is reasonable to expect that the resulting regulatory measures will impose on imported products a *heavier burden than that planned* by mindful regulators.

Ingroup favoritism norms prevailing in regulators' social environment tend to increase the prospect of discriminatory behavior towards foreign products.⁹² Thus, where it is credibly proven that the particular key regulator's social environment is characterized by significant favoritism norms, it is desirable to grant some probative weight to such norms.⁹³

⁸⁴See FISKE & TAYLOR, *supra* note 41, at 161–62. See also LIBERMAN, *supra* note 83, at 108.

⁸⁵See, e.g., FISKE & TAYLOR, *supra* note 41, at 422; GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF & OTHERS 514 (2005).

⁸⁶On intentions as predicting behavior, see ICEK AJZEN, ATTITUDES, PERSONALITY AND BEHAVIOR 100–01 (2d ed. 2005); Paschal Sheeran & Thomas L. Webb, *The Intention–Behavior Gap. Social and Personality*, 10 PSYCH. COMPASS 503, 503 (2016); Baird and Astington, *supra* note 68, at 258.

⁸⁷Horn and Mavroidis also proposed (for other reasons) to examine the stated intent behind the governmental measure in order to determine whether Article III: 2 is violated. See Henrik Horn & Petros C. Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, 15 EUR. J. INT'L L. 1, 60 (2004).

⁸⁸Multiple regulators often participate in a decision-making process resulting in regulatory measures affecting trade. We suggest focusing on regulators who played a key role in the particular decision-making processes. On the unit of analysis in behavioral studies and the option of focusing on "elite" decision-makers, see, e.g., van Aaken, *supra* note 70, at 442. See also Broude, *supra* note 70, at 1129–30.

⁸⁹The law of evidence addresses, *inter alia*, two significant issues: whether some evidence is to be received by the tribunal (according to "rules of admissibility,") and the weight to be given to a particular item of evidence. The "probative weight" of a particular item of evidence (that has been admitted by the tribunal) is related to the second issue. The probative weight of an item of evidence can be low (and possibly outweighed by countervailing items of evidence) or high. Ho Hock Lai, *The Legal Concept of Evidence*, in STAN. ENCYCLOPEDIA OF PHILOSOPHY 3.1 (2021). As to the WTO tribunals, on the distinction between questions concerning the admissibility of evidence and questions concerning the weight to be accorded to the evidence, see GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES 134 (2015).

⁹⁰Some concerns regarding granting probative weight to regulators' subjective intentions are addressed *infra* Part E.

⁹¹It is noteworthy that we do not suggest that that regulators' subjective intentions constitute a prerequisite for the establishment of a breach of Article III or the determinative factor regarding the legality of a particular regulatory measure under this Article. Additional evidence regarding other factors should also be taken into account by WTO tribunals.

⁹²See *supra* Parts C and D(I).

⁹³We suggest granting *more* probative weight to credible evidence regarding key role regulators' discriminatory intentions than to evidence regarding the presence of favoritism norms. This is in line with findings arising from studies indicating that intentions offer superior prediction of behavior than norms. Sheeran & Webb, *supra* note 86, at 503, and see the references therein. See also AJZEN, *supra* note 86, at 124–25.

III. The Mindless Regulator

While the image of mindful regulators pervades mainstream WTO legal literature, the real-life of many regulatory environments is arguably more influenced by mindless regulators.⁹⁴ Mindless regulators do not aim to discriminate against imported goods and do not pay significant attention to disparate impacts of their measures on imported/local goods. Rather, they are characterized by intention to promote non-trade interests, like raising government revenues or protecting public health. Such regulators are generally aware of competitive relations between local and foreign producers but this fact is relegated to the background. Mindless regulators do not operate in a social vacuum; they are commonly influenced by sociocultural factors infusing their social groups and are susceptible to certain related cognitive biases.

Empirical studies have persuasively demonstrated that once people identify with a social group, they are likely to grant ingroup members preferential treatment. Ingroup favoritism attitudes and behavior are often elicited or supported by social norms guiding people to be “loyal” to their group.⁹⁵ Even when people did not internalize ingroup favoritism norms during their socialization process, deviating from those norms is expected to encounter social pressure and adverse social reactions.⁹⁶ Public officials involved in the formation of regulatory measures influencing trade are often senior government servants who have served their country for long periods; many of them identify with their nation and have been socialized to promote the public and societal interest.⁹⁷ Thus, mindless regulators do not purposefully intend to discriminate against imported products, but they are likely to be influenced—often below the conscious level—by their social identity, ingroup trade favoritism norms,⁹⁸ and exposed to social pressure to conform with those norms. Decision-making processes undertaken by such regulators are also susceptible to cognitive biases accompanying “loyalty” norms, such as those involved in selecting one of the alternative regulatory measures affecting trade.

Mindless regulators preparing various safety measures—for example, concerning public health—are susceptible to the influence of *trust deficit* towards outgroup producers. Adopting a relatively stringent or lenient regulatory measure depends, inter alia, on the expected risk from the particular imported good. Risk perceptions of products are associated with trust in manufacturers. Intergroup studies indicate that generally ingroup members are believed to be trustworthy and honest, whereas outgroup members are often perceived as untrustworthy and dishonest.⁹⁹ Lower levels of trust in foreign producers¹⁰⁰ can influence regulators to apply more stringent (and onerous) requirements to foreign goods, not due to discriminatory intention but rather because of trust deficit and genuine anxieties concerning risk expected from outgroup manufacturers.

WTO law does not bind all member states to adopt the same set of regulatory standards in a particular field, and shaping distinct national measures applicable to domestic and imported

⁹⁴On the prevalence of “subtle, automatic and unintentional” intergroup biases, see FISKE & TAYLOR, *supra* note 41, at 304.

⁹⁵See *supra* Part B.

⁹⁶On the influence of loyalty norms and accompanying social pressure on young children, see Dominick Abrams, Sally B. Palmer, Adam Rutland, Lindsey Cameron, & Julie Van de Vyver, *Evaluations of and Reasoning About Normative and Deviant Ingroup and Outgroup Members*, 50 DEVELOPMENTAL PSYCH. 258, 258–59 (2014).

⁹⁷On the tendency of public officials to promote public and societal interests, see Yannis Georgellis, Elisabetta Iossa, & Vurain Tabvuma, *Crowding Out Intrinsic Motivation in the Public Sector*, 21 J. PUB. ADMIN. RES. THEORY 473, 475 (2011). On the tendency of public officials to conform to professional norms arising from their socialization and shared identities, see, e.g., Daniel P. Carpenter & George A. Krause, *Transactional Authority and Bureaucratic Politics*, 25 J. PUB. ADMIN. RES. THEORY 5, 13 (2014). On organizational socialization of public officials, see Stéphane Moyson, Nadine Paaphorst, Sandra Groeneveld, & Steven Van de Walle, *Organizational Socialization in Public Administration Research*, 48 AM. REV. PUB. ADMIN. 610 (2018).

⁹⁸On the tendency of unconscious processes to rely on deeply rooted norms, see Michèle Lamont, Laura Adler, Bo Yun Park, & Xin Xiang, *Bridging Cultural Sociology and Cognitive Psychology in Three Contemporary Research Programmes*. 1 NATURE HUM. BEHAV. 866, 869–70 (2017).

⁹⁹See *supra* Part C.

¹⁰⁰It is noteworthy that in some contexts, foreign producers may be more trustworthy than local manufacturers.

products is vulnerable to *representative bias*. The “representative heuristic” concerns assessment of the probability that some event will occur, and it refers to the tendency to base risk estimation on a generalization of a previously acquired representative category of events.¹⁰¹ The assumed probability of an event is judged by how much it resembles one of the alternatives being considered by the person,¹⁰² sometimes based on partial information or stereotypes.¹⁰³ Mindless regulators’ risk estimations are likely to be influenced by their previous experience and information derived from their own national environment. The assumed probability (relied on the local environment) does not necessarily reflect the reality¹⁰⁴ of foreign manufacturing. Thus, while those risk assessments relating to foreign products are not intentionally designed to discriminate against imported products, the tendency to rely on estimations relating to the regulator’s local environment may occasionally generate regulatory measures that practically favor the interests of local producers. Such practical preference of the interests of local producers may arise where the risk expected from manufacturing a product abroad is lower than the risk of producing that good in the regulator’s country, but the regulator erroneously assesses the risk expected from production abroad as higher than production in her/his country.

The WTO law: Mindless regulators do not consciously intend to discriminate against imported products, but unconscious cognitive processes rely heavily and uncritically on culturally available norms and schemata. Schemata are knowledge structures and provide default assumptions about their characteristics, relationships, and consequences under conditions of incomplete information.¹⁰⁵ Thus, due to ingroup favoritism norms, trust deficit in foreign manufacturers, and representative bias, mindless regulators may often establish discriminatory regulatory regimes imposing an unequal burden on foreign goods.

Should the *absence* of discriminatory intention obstruct a legal finding that the particular discriminatory measures breach GATT Article III? Ample studies show that routine discriminatory processes are performed unconsciously, and discriminatory practices are often unintentional.¹⁰⁶ These studies support current WTO jurisprudence that does *not* demand proof of discriminatory intention as a prerequisite for the establishment of a breach of Article III.¹⁰⁷ It should be emphasized that the justification here for not preconditioning violation of Article III by a proof of intention does not relate to difficulties in proving subjective intent, but rather to the *absence* of discriminatory intent in numerous cases of granting favorable treatment to national products.

Mindless regulators are often influenced by ingroup favoritism norms and certain biases pertaining to outgroup manufacturers, often below the conscious level; consequently, it is advisable that WTO tribunals consider if significant “loyalty” norms prevail in the social environment in which the particular key role regulators operates. Where it is credibly proven that the questionable regulatory measure has been developed in a social group characterized by such discriminatory norms, it is recommended to assign some probative weight to such norms (reinforcing a finding of a breach of Article III).¹⁰⁸

¹⁰¹See FISKE & TAYLOR, *supra* note 41, at 189–92.

¹⁰²See MOSKOWITZ, *supra* note 85, at 142–43. See also GALOTTI, *supra* note 41, at 317–19.

¹⁰³KAHNEMAN, *supra* note 75, at 46–53.

¹⁰⁴Catherine Darker & Anna C. Whittaker, *Risk Perception*, in *ENCYCLOPEDIA OF BEHAVIORAL MEDICINE* 4615–16 (M. Gellman ed., 2020).

¹⁰⁵See Paul DiMaggio, *Culture and Cognition*, 23 *ANN. REV. SOCIO.* 263, 269 (1997). See also Karen A. Cerulo, *Mining the Intersections of Cognitive Sociology and Neuroscience*, 38 *POETICS* 115, 117 (2010).

¹⁰⁶See, e.g., FISKE & TAYLOR, *supra* note 41, at 304. See also Margo Monteith, Anna Woodcock & Jill E. Gulker, *Automaticity and Control in Stereotyping and Prejudice*, in *THE OXFORD HANDBOOK OF SOCIAL COGNITION* 74, 76–79 (Donal E. Carlston ed., 2013).

¹⁰⁷See *supra* Part B.

¹⁰⁸As explained in *supra* Part D(II), we suggest granting more probative weight to key regulators’ intention than to ingroup favoritism norms prevailing in their social group.

IV. The Bias-Resisting Regulator

Bias-resisting regulators intend to grant equal treatment to domestic and imported products and resist ingroup biases. They are interested in promoting certain non-trade objectives (such as environmental protection), are aware of competitive relations between the particular products, and aim to override protectionist tendencies in their social environment.¹⁰⁹ Of the three categories of regulators discussed here, these ones are the least prone to adopt discriminatory measures. Though bias-resisting regulators consciously aim at applying equal regulatory treatment, decision-making processes often involve less conscious elements, which are more susceptible to discriminatory tendencies. Social cognition scholarship on “automaticity in goal pursuit” points out that conscious goal-pursuit implicates some mental processes outside conscious awareness, such as habitual responses to cues or automatic evaluation.¹¹⁰ The latter non-conscious processes are more vulnerable to mental biases and sociocultural schemata.¹¹¹ While engaged in deliberate-intentional thinking, decision-makers may inhibit and override latent tendencies and automatically-activated biases.¹¹² Such deliberate processes are mentally effortful, requiring, for example, constant re-evaluation of existing assessments and correcting biases, and thus necessitating more cognitive resources.¹¹³

Bias-resisting regulators who aim at overcoming discriminatory biases have to continuously review information and assessments provided by other government officials (who are often swayed by conscious or unconscious favoritism inclinations), re-evaluate the latter’s interpretation and reconsider the weight to be accorded to submitted data. Such regulators aim to resist discriminatory norms and associated biases, but the required cognitive resources may not be available to them at critical junctures of the decision-making process. In the latter cases, routinized mental processes that are more susceptible to cognitive and sociocultural biases are likely to influence bias-resisting regulators. Even where such regulators have the necessary mental resources to resist discriminatory biases, non-compliance with ingroup favoritism norms is likely to encounter social pressure exerted by other group members. Where bias-resisting regulators do not have the required cognitive resources or cannot withstand the surrounding social pressure, the above biases associated with mindless discrimination are likely to infuse regulatory decision-making, and lead to certain discriminatory practices against foreign products.

The WTO law: Social cognition literature reveals that cognitive processes (prominently intentions) often steer behavior.¹¹⁴ Anti-discriminatory intention increases the likelihood of non-discriminatory behavior and it suggests that where it is credibly proven that bias-resisting regulators played a key role in the decision-making leading to the challenged regulatory measure, it is desirable that WTO tribunals assign to such evidence significant probative weight (bolstering the argument for non-violation of Article III). Since the influence of regulators’ intentions is not limited to objective intentions revealed in the regulatory measure itself, this suggestion applies to non-discriminatory intentions evidenced both in the regulatory measure or in other items of evidence. In parallel to the previous discussion on discriminatory intentions,¹¹⁵ assigning significant probative

¹⁰⁹Bias resisting regulators can be motivated by free trade ideology (emphasizing long-term economic benefits of non-discriminatory trade), equality values, or by other considerations.

¹¹⁰See FISKE & TAYLOR, *supra* note 41, at 426–28. See also KAHNEMAN, *supra* note 75, at 24–25; Melissa J. Ferguson & Jeremy Cone, *The Mind in Motivation: A Social Cognitive Perspective on the Role of Consciousness in Goal Pursuit*, in THE OXFORD HANDBOOK OF SOCIAL COGNITION 476, 482 (Donal E. Carlston ed., 2013).

¹¹¹See, e.g., DiMaggio, *supra* note 105, at 269; Cerulo, *supra* note 105, at 117. Lamont et al., *supra* note 98, at 869. On unconscious processes that rely on cultural schemata, see *supra* Part D(III).

¹¹²See, e.g., MARTHA AUGOUSTINOS, IAIN WALKER & NGAIRE DONAGHUE, SOCIAL COGNITION 113 (3d ed. 2014); Cerulo, *supra* note 105, at 117.

¹¹³See MOSKOWITZ, *supra* note 85, at 224. See also Woodcock & Gulker, *supra* note 106, at 81; Ferguson & Cone, *supra* note 110, at 477.

¹¹⁴See, e.g., AJZEN, *supra* note 86, at 100–01; Sheeran & Webb, *supra* note 86, at 503. See also FISKE & TAYLOR, *supra* note 41, at 422; MOSKOWITZ, *supra* note 85, at 514.

¹¹⁵See *Supra* Part D(II).

value to credible evidence regarding intention to resist discrimination is justified by the significant effect of intentions on behavior.

The above recommendation does not suggest that regulators' anti-discriminatory (or discriminatory) intentions should constitute a precondition or determinative factor in assessing the lawfulness/unlawfulness of a particular regulatory measure under GATT Article III. Additional items of evidence relating to the other elements of Article III (such as the adverse effects on conditions of competition) should also be considered by the WTO tribunals. For example, in some cases, notwithstanding key decision-makers' anti-discriminatory intentions, origin-neutral rules may lead to a violation of Article III. Such a breach of the national treatment obligation may arise from discriminatory implementation of neutral regulatory measures by other government officials, who are influenced by ingroup favoritism norms.

In light of the discussion above on the likely effects of "loyalty" norms on decision-makers, societies characterized by significant ingroup pro-favoritism norms are likely to undermine genuine efforts undertaken by bias-resisting regulators to grant equal treatment; once credibly established, such ingroup favoritism norms call for granting some probative weight to such items of evidence (bolstering the argument for a breach of Article III).¹¹⁶

E. Elusive Factors and Mindreading

Regulators' subjective intentions are not directly accessible to adjudicators and frequently not easily ascertained by tribunals. This difficulty, as well as the rational-economic thinking infusing the WTO legal system,¹¹⁷ can explain the general reluctance of WTO tribunals to assign probative weight to evidence regarding regulators' subjective intentions (that are not manifested in the regulatory measure itself). Notwithstanding the above hurdles, regulators' subjective intentions, either discriminatory or anti-discriminatory, can occasionally be discerned from various expressions outside the specific regulatory measure. Such subjective intentions are taken into account by some international tribunals¹¹⁸ (including some reports of the WTO tribunals regarding discrimination).¹¹⁹ Thus, for example, international tribunals engage in ascertaining whether some elusive legal-mental elements are satisfied in specific circumstances relating to "good faith," interpretation of treaties according to the intentions of the parties,¹²⁰ or whether a state's unilateral declaration was made with an intent to commit itself.¹²¹

Some concerns regarding taking into account regulators' subjective intentions refer to the fact that decision-making processes leading to governmental measures involve multiple actors, and that these actors occasionally have multiple intentions.¹²² Addressing these concerns, this contribution suggests granting probative weight only to evidence regarding the intentions of regulators who played a key role in the particular decision-making process. And where key regulators have multiple intentions, it is proposed granting probative weight to the intention that dominated the decision-making process. Societal norms concerning ingroup favoritism and related social processes are often

¹¹⁶As noted, *supra* Part D(II), we suggest granting higher probative weight to key regulators' intentions (either discriminatory or anti-discriminatory intentions) than to ingroup favoritism norms prevailing in their social group.

¹¹⁷See *Supra* Part D(II).

¹¹⁸See, e.g., Andrei Mamolea, *Good Faith Review*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARDS OF REVIEW AND MARGIN OF APPRECIATION* 74, 78–80 (2014). As to investment tribunals addressing discriminatory arguments, see, e.g., *SD Myers v. Canada*, First Partial Award, 26 January 2006, paras. 161–95, 254. See also *Genin v. Estonia*, Award, 25 June 2001, para. 369; *Methanex v. United States of America*, Final Award, 3 August 2005, Part IV, Chapter B, para. 12.

¹¹⁹See, e.g., Panel Report, *Mexico–Soft Drinks*, para. 8.91–892, WTO Doc., WT/DS308/R, (adopted October 7, 2005).

¹²⁰On treaty interpretation according to the parties' intention (that includes subjective and objective intentions), see, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 707–08 (8th ed. 2017). On interpretation of treaties according to their "object and purpose" (which includes subjective and objective elements), see, e.g., ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES* 205 (2007).

¹²¹See, e.g., *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, 1986 I.C.J. 554, 573–74 (Dec. 22).

¹²²See, e.g., MITCHEL, HEATON AND HENCKELS, *supra* note 9, at 103, 117.

subtle, but can be discerned from diverse sources (such as social perceptions indexes or international organizations' reports). Thus, while addressing such elusive cognitive or social concepts present difficulties for WTO adjudicators, once they are presented with credible evidence proving their presence in a particular case, it is desirable to seriously consider such items of evidence (together with additional items of evidence) and grant them adequate probative weight.

While this contribution suggests that WTO tribunals should seriously consider credible evidence derived from a variety of sources concerning key role regulators' intentions and biases, adjudicators approaching this task should be aware of certain biases that often accompany attempts to "mindread" other people's intentions. Attribution of mental states to other people is frequently influenced by the perceiver's mental dispositions¹²³ and is often inferred from categorizing other humans to a particular group. Where the other person belongs to the perceiver's social group (or a similar group), the perceiver tends to project a mental state characterizing herself/himself in a similar situation. If the other person does not appear to belong to the perceiver's group, there is an inclination to assign a mental state corresponding to the perceiver's pre-existing conception of how people belonging to the other group typically think ("prototyping").¹²⁴ Thus, WTO adjudicators engaged in discerning the intention of key regulators should be aware of this bias and make efforts to override it by shifting their own thinking to a deliberative mode.

F. Concluding Remarks

Regulators' subjective intentions, cognitive biases, and social norms supporting ingroup trade favoritism explain (at least partially) why discrimination against foreign products is prevalent in the international trading system. It is not realistic to eradicate trade discrimination against imported goods, and the WTO legal regime aiming to mitigate discrimination during the current period (marked by rising national sentiments) faces an uphill battle. Experience from other fields characterized by widespread discrimination, such as discrimination against women or people belonging to the LGBTQ community, indicates, however, that in the long run, social norms and socio-cognitive patterns can change and discrimination can be lessened.

The preceding sections have highlighted the role of socio-cognitive and social factors in discriminatory behavior against foreign products, primarily key regulators' intentions, ingroup favoritism norms, and related cognitive biases. Although detecting such subjective factors presents WTO tribunals with certain difficulties, ignoring or underestimating them does not reflect the real life of trade discrimination and is not in line with the human tendency (including among adjudicators) to "mindread" other people. International tribunals in other fields often cope with such tasks, for example, with regard to findings regarding "good faith" or treaty interpretation according to the parties' intention. Thus, where WTO tribunals are presented with credible evidence regarding key role regulators' intentions (discerned from both objective and subjective items of evidence¹²³) or relevant norms prevailing in their social groups, it is desirable that they openly and seriously take into account such evidence and grant it appropriate probative weight.

¹²³Cristiano Castelfranchi, *Mind Reading: How and for What?*, 3 ANNALS COGNITIVE SCI. 86, 105 (2019); Kevin J. Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 325–26 (2009).

¹²⁴See, e.g., Heller, *supra* note 123, at 326, 331–32, 345–47 (on studies regarding juries, see at 332–334); Castelfranchi, *supra* note 123, at 105.